

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THEODORE GRAY, SR.,

Defendant-Appellant.

---

UNPUBLISHED

November 25, 2014

No. 317129

Ottawa Circuit Court

LC No. 12-036988-FC

Before: BOONSTRA, P.J., and DONOFRIO and GLEICHER, JJ.

PER CURIAM.

A jury convicted defendant of three counts of first-degree criminal sexual conduct (CSC-I) in violation of MCL 750.520b(1)(a), (sexual penetration with a victim under 13 years of age), in connection with the long-term molestation of defendant's niece. Defendant challenges the admission of evidence that he had similarly sexually assaulted young relatives in the past, defense counsel's performance in failing to interview and present certain witnesses, and the court's determination at sentencing that defendant had taken his victim to a place of greater danger to commit the offenses. Defendant's challenges are all without merit. We therefore affirm.

**II. BACKGROUND**

The 24-year-old victim testified that defendant is married to her maternal aunt (DG) and the victim often spent the night at defendant's home as a child. She alleged that defendant began sexually assaulting her when she was five years old. The victim claimed that the initial assaults involved digital-vaginal penetration and escalated to fellatio over time. On one occasion when she was eight years old, the victim asserted that defendant blew some sort of smoke or dust in her face that made her feel "very out of it." When the victim was 10 or 11, defendant escalated his conduct to penile-vaginal penetration.

Prior to trial, the prosecutor filed a notice of intent to introduce evidence that defendant had committed other acts of sexual assault against minors pursuant to MCL 768.27a. Specifically, the victim's mother (AC) and AC's twin sister (AA) would testify that they met defendant when they were eight years old and defendant began dating their older sister. Both women planned to testify that defendant engaged in a long-term course of escalating sexual assaults upon them and often gave them alcohol beforehand to subdue them. The trial court

admitted this evidence and AC and AA gave testimony tending to support the victim's allegations.

Defendant presented witnesses to impeach the victim's credibility. The jury discredited their testimony, however, and convicted defendant as charged.

## II. PRIOR ACTS EVIDENCE

Defendant first challenges the trial court's admission of AC's and AA's testimony. We review the trial court's evidentiary ruling for an abuse of discretion, *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998), and underlying legal questions de novo. *People v Mardlin*, 487 Mich 609, 614; 790 NW2d 607 (2010).

The prosecution notified defendant of its intent to introduce evidence of other uncharged acts under MCL 768.27a, which provides, "in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant."<sup>1</sup> Our Supreme Court has held that MCL 768.27a permits admission of other acts evidence even if its only relevance is to show the propensity of the defendant to commit the charged offense. *People v Watkins*, 491 Mich 450, 470; 818 NW2d 296 (2012). MCL 768.27a conflicts with and prevails over the MRE 404(b) preclusion of character or propensity evidence of this nature. *Watkins*, 491 Mich at 455.

Defendant's sexual assaults of AA and AC qualify as listed offenses against minors as contemplated in MCL 768.27a. However, evidence admitted under MCL 768.27a remains subject to MRE 403, and must be analyzed under that evidentiary rule before being presented to the jury. *Watkins*, 491 Mich at 481. MRE 403 provides, "Although relevant, evidence may be excluded if *its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.*" (Emphasis added.) Evidence is deemed unfairly prejudicial under MRE 403 "when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001).

In *Watkins*, our Supreme Court provided guidance in applying MRE 403 to propensity evidence proffered under MCL 768.27a. Notably, "[t]o weigh the propensity inference derived from other-acts evidence in cases involving sexual misconduct against a minor on the prejudicial side of the balancing test would be to resurrect MRE 404(b), which the Legislature rejected in MCL 768.27a." *Watkins*, 491 Mich at 486. Therefore, when a trial court is conducting its MRE 403 balancing analysis, it "must weigh the propensity inference in favor of the evidence's probative value rather than its prejudicial effect. That is, other-acts evidence admissible under MCL 768.27a may not be excluded under MRE 403 as overly prejudicial merely because it allows a jury to draw a propensity inference." *Watkins*, 491 Mich at 487.

---

<sup>1</sup> CSC-I is a listed offense against a minor. MCL 28.722(e)(x); MCL 768.27a(2)(a).

The Supreme Court outlined an “illustrative rather than exhaustive” list of factors a trial court may consider during its MRE 403 balancing test. *Watkins*, 491 Mich at 487. These include:

(1) the dissimilarity between the other acts and the charged crime, (2) the temporal proximity of other acts to the charged crime, (3) the frequency of the other acts, (4) the presence of intervening acts, (5) the lack of reliability of the evidence supporting the occurrence of the other acts, and (6) the lack of need for evidence beyond the complainant’s and the defendant’s testimony. [*Id.* at 487-488.]

Trial courts are also permitted to limit the amount of other acts evidence admitted under MCL 768.27a to avoid “ ‘confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.’ ” *Watkins*, 491 Mich 489, quoting MRE 403.

Defendant’s acts toward AA and AC were strikingly similar to the charged acts against the current victim. All victims are defendant’s relatives: AA and AC are defendant’s younger sister-in-laws and the current victim is defendant’s niece. The girls were close in age when the assaults began: AA and AC were eight while the victim was five. All offenses occurred while the girls were staying overnight in the same house as defendant. Defendant’s sexual assaults of all three girls escalated over a long time period, beginning with touching or digital penetration and moving into fellatio before penile-vaginal penetration. During penile-vaginal penetration, defendant covered all three victims’ mouths with his hand to silence them. AC testified that, like the victim, defendant would move her to an isolated part of the house to commit his assaults. AA and AC also testified that defendant sometimes gave them alcohol to subdue them. This was similar to defendant blowing a narcotic in the victim’s face to make her feel “out of it.”

While defendant’s sexual assaults of AA and AC occurred approximately 20 years before that of the current victim, the similarity of the acts diminishes the import of the temporal divide. See *People v Brown*, 294 Mich App 377, 387; 811 NW2d (2011) (“The remoteness of the other act affects the weight of the evidence rather than its admissibility.”). Moreover, such corroborating evidence for the victim’s allegations was necessary in light of defendant’s presentation of other family members to disclaim that the events occurred and to impugn the victim’s veracity. Given the probative value of this evidence, the circuit court acted within its discretion in admitting the testimony of AA and AC.

In addition, the danger of unfair prejudice was reduced when the trial court instructed the jury consistent with CJI2d 20.28a regarding the proper use of MCL 768.27a evidence. As noted in *Watkins*, 491 Mich at 480, this instruction is a “tool” that can be used to limit prejudice by “ensur[ing] that the jury properly employs that evidence.” Jurors are presumed to follow their instructions, *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998), and thereby only convict a defendant if they believe he committed the charged offense, not any past misdeed.

Although not included in his statement of the questions presented, defendant also challenges the admission of a third witness’s testimony in the body of his appellate brief. Despite that this challenge was not properly presented to this Court, we briefly address it. See

MCR 7.212(C)(5); *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000). Before trial, the prosecutor sought to present the testimony of PJS regarding her relationship with defendant, including evidence that defendant had blown crack cocaine smoke in her face prior to intercourse. The court excluded PJS's testimony about that particular act. As a result, PJS testified only that she was a friend of defendant's teenage daughter when she met defendant at the age of 17 and began an adulterous relationship with him, eventually giving birth to two children. We agree with defendant that this evidence was completely irrelevant to the matters at hand and should not have been presented to the jury. This error was harmless, however, in light of the victim's testimony about the assaults perpetrated against her and AA's and AC's corroborating testimony.

### III. OV 8

Defendant challenges the trial court's score of 15 points for offense variable (OV) 8 at the sentencing hearing. Pursuant to MCL 777.38, a sentencing court must consider whether the defendant engaged in "victim asportation or captivity." Fifteen points must be scored when "[a] victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense." MCL 777.38(1)(a). To establish asportation, the movement of the victim must "not be incidental to committing an underlying offense." *People v Spanke*, 254 Mich App 642, 647; 658 NW2d 504 (2003). Asportation requires some movement of the victim beyond that incidental to the commission of the underlying offense, but can occur without the use of force against the victim. *People v Dillard*, 303 Mich App 372, 379; 845 NW2d 518 (2013). A place of greater danger includes an isolated location where criminal activities might avoid detection. *Id.*

When reviewing a trial court's scoring decision, the court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake was made." *People v McDade*, 301 Mich App 343, 356; 836 NW2d 266 (2013). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Hardy*, 494 Mich at 438. "Offense variables must be scored giving consideration to the sentencing offense alone, unless otherwise provided in the particular variable." *People v McGraw*, 484 Mich 120, 133; 771 NW2d 655 (2009).

Defendant's sentencing information report reveals that his sentence was based on the scoring of the offense variables in relation to the third CSC-I count: penile-vaginal penetration. In relation to that offense, the victim testified that when she was 10 or 11 years old, defendant summoned her into the pantry where he covered her mouth to silence her and then sexually assaulted her. This was an isolated room where defendant's offense was unlikely to be detected by others. Therefore, a preponderance of the record evidence supports that defendant asported the victim to a place of greater danger, thereby justifying the 15-point score for OV 8.

#### IV. ASSISTANCE OF COUNSEL

In a pro se supplemental brief filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4, defendant contends that his trial counsel was ineffective because he 1) failed to investigate or interview witnesses to impeach the victim's testimony, and at trial, did not call additional witnesses who had personal knowledge about the victim's reputation for telling the truth and whether she committed perjury, 2) did not interview certain individuals whom defendant identified as possible additional defense witnesses, and 3) did not obtain a plea offer from the prosecution.

To preserve a claim of ineffective assistance of counsel, the defendant must move for a new trial or an evidentiary hearing under *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009). Defendant failed to seek such a hearing below, but filed a motion in this Court requesting a remand to pursue a *Ginther* hearing. This Court denied defendant's remand motion. *People v Gray*, unpublished order of the Court of Appeals, entered January 14, 2014 (Docket No. 317129). This Court's order was issued on the merits of the request as follows:

While defendant-appellant has supported his motion with an affidavit or offer of proof, he has failed to show that his trial attorney inadequately investigated all possible witnesses. Defendant-appellant has not shown that he can overcome the presumption that his attorney chose not to call additional defense witnesses for strategic reasons or that he can prove that the failure to call additional defense witnesses affected the outcome of the trial. Furthermore, defendant-appellant cannot establish that his trial counsel was ineffective for not negotiating a plea deal when he has not offered any proof that the prosecution was willing to agree to a plea bargain and defendant-appellant had no right to receive a plea offer from the prosecution. [*Id.*]

Defendant did not seek reconsideration of that order and its conclusions are now the law of the case. We may not revisit these challenges. See *People v White*, \_\_\_ Mich App \_\_\_, \_\_\_; \_\_\_ NW2d \_\_\_ (Docket No. 315579, issued October 23, 2014), slip op at 2 (declining to address an issue raised in an early motion that this Court denied on the merits). See also *People v Hayden*, 132 Mich App 273, 297; 348 NW2d 672 (1984).

We affirm.

/s/ Mark T. Boonstra  
/s/ Pat M. Donofrio  
/s/ Elizabeth L. Gleicher